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In the
Supreme Court of the United States

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205; MONICA STEPHAN, ANNELISA CLEARY, et al.,
Petitioners,

v.

KELLY BAIRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an action for breach of contract constitutes adequate post-termination process for a contractual employee following a pre-termination *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) hearing, or whether, as the Seventh Circuit held, a breach of contract action is insufficient post-termination process where no remedy of reinstatement is available?

2. If a breach of contract action is not adequate post-termination process, was the employee's right to a full trial-type pre-termination hearing "clearly established" so as to deprive the individual defendants of qualified immunity, as the Seventh Circuit held?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners: Board of Education, Warren Community Unit School District 205
Monica Stephan
Annelisa Cleary
Judy Gates
Mary Vincent
Joseph Green
Donald Hill
Robert Lethlean

Respondent: Kelly Baird

STATEMENT PURSUANT TO RULE 29.6

Petitioners are a governmental corporation and public officials, and thus no disclosure statement is required pursuant to Rule 29.6.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS AND STATUTES 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 4

A. Because the Seventh Circuit's Decision Imposes Significant New Liabilities on Public Bodies and Public Officials, This Case Raises Issues of Critical Importance 5

B. The Seventh Circuit's Decision Conflicts With Decisions of Other Courts of Appeals 7

C. The Seventh Circuit's Decision Contains Significant Errors of Law 11

1. A Post-Termination Breach of Contract Action Is Constitutionally Sufficient Post-Termination Process For A Contractual Employee 11

2. The Denial of Qualified Immunity Directly Violates This Court's Consistent Requirement of a "Clearly Established" Constitutional Violation 16

CONCLUSION 19

APPENDIX

A. Seventh Circuit Order denying rehearing 1a
B. Seventh Circuit decision 2a
C. Northern District of Illinois decision 21a
D. Northern District of Illinois decision 27a
E. Evaluation 31a
F. Employment Contract 45a

TABLE OF AUTHORITIES

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 16, 19

Arthur S. Lujan v. G&G Fire Sprinklers, Inc.,
532 U.S. 190 (2001) . . . . . passim

Barry v. Barchi, 443 U.S. 55 (1979) 12

Beischel v. Stone Bank School District,
362 F3d. 430 (7th Cir. 2004) 10

Bessler v. Board of Education,
69 Ill.2d 191, 370 N.E.2d 1050,
13 Ill.Dec. 23 (1977) 14-15

Brousseau v. Haugen, 125 S.Ct. 596 (2004) 16, 17

Cleveland Board of Education v. Loudermill,
470 U.S. 532 (1985) . . . . . passim

FDIC v. Mallen, 486 U.S. 230 (1988) 12, 13

Gilbert v. Homar, 520 U.S. 924 (1997) 5, 8

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16

Harris v. Board of Education of the City of Atlanta,
105 F.3d 591 (11th Cir. 1997) 8

Holloway v. Reeves, 277 F.3d 1035 (8th Cir. 2002) . . 8, 10

Kinsey v. Salado Independent School District,
950 F.2d 988 (5th Cir. 1992) 8, 9

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694,
33 L.Ed. 570 (1972) 16, 18

Pounds v. Griepenstroh, 970 F.2d 338 (7th Cir. 1992) . . 7

Reich v. Beharry, 883 F.2d 239 (3d Cir. 1989) 6

*Royster v. Board of Trustees of Anderson County
School District*, 774 F.2d 618 (4th Cir. 1985) 8

Saucier v. Katz, 533 U.S. 194 (2001) 16, 18

Strasburger v. Board of Education,
143 F.3d 351 (7th Cir. 1998) 17

Ulichny v. Merton Comm. Sch. Dist.,
249 F.3d 686 (7th Cir. 2001) 9

Zannis v. Lake Shore Radiologists, Ltd.,
73 Ill.App.3d 901, 392 N.E.2d 126,
29 Ill.Dec. 569 (1st Dist. 1979) 15

Statutes

105 ILCS 5/10-23.8 . . . . . 2, 14

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-20a) below is reported at 389 F.3d 685. The order denying rehearing (App. 1a) is unreported. The opinions of the district court denying petitioners' Motion to Dismiss (App. 27a-30a) and granting their Motion for Summary Judgment (App. 21a-26a) are unreported.

JURISDICTIONAL STATEMENT

The judgment of the Seventh Circuit Court of Appeals sought to be reviewed was issued on November 12, 2004. On December 29, 2004, the Seventh Circuit Court of Appeals entered its Order denying the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, 14th Amendment

> Section 1 * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *

105 ILCS 5/10-23.8

Superintendent contracts. *** By accepting the terms of a multi-year contract, the superintendent waives all rights granted him or her under Sections 24-11 through 24-16 of this Act [105 ILCS 5/24-11 through 105 ILCS 5/24-16] only for the term of the multi-year contract. Upon acceptance of a multi-year contract, the superintendent shall not lose any previously acquired tenure credit with the district.

STATEMENT OF THE CASE

Plaintiff, Kelly Baird, was hired as superintendent and principal of Warren School District pursuant to a three-year employment contract which specifically included a provision allowing for termination for cause. (App.45a-57a, Contract Sections E1 and E3, 53a-54a). At the conclusion of his first year, the Board evaluated him and, in a detailed written evaluation, found his performance unacceptable. (App. 31a-44a). Concerns with his performance included: lying to the Board about applying for a needed county grant, lack of support for new teachers, ineffective student discipline, destruction of District files, and absence and tardiness concerns. *Id.*[1]

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[1] The Superintendent refused to attend his performance review, although attendance was required by his contract. See App. 54a, Section F.

Based on these concerns, the Board provided Baird with notice that it would conduct a hearing to consider terminating his employment, and informed him that the grounds for considering his termination were the grounds set out in his written evaluation. (App. 4a) The Board invited Baird to attend the hearing to present his case to the Board. *Id.*

The superintendent refused to meet with the Board. He appeared with his attorney before the hearing began to object to its form; he then left the room and refused to participate. *Id.* The Board went forward with the hearing, and found that there was just cause to terminate his employment.[2] *Id.*

Baird filed suit in state court, claiming breach of contract and challenging the procedural due process implications of the Board's actions. (App. 5a) Specifically, the Complaint raised two due process issues: whether the Board provided Baird with sufficient pre-termination process, and whether certain Board members who had been critical of his job performance were unconstitutionally "biased" against him. The Defendants removed the case to Federal Court. After the close of discovery, the district court granted summary judgment in favor of Defendants on both issues, and remanded the case to state court for trial on the breach of contract claim. *Id.*

The Seventh Circuit of Appeals affirmed the District Court's judgment denying the bias claim. The Court reversed the District Court's judgment on the remaining procedural due process claim, however, and held that despite conducting a pre-

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[2] The employment contract between the parties defined cause as "any conduct, act or failure to act by the Superintendent which is detrimental to the best interests of the School District" (App.54a, Contract Section E3).

termination hearing affording Baird substantial process to defend himself, consistent with *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Board had failed to provide him with due process. The Court held that a breach of contract action following a pre-termination *Loudermill* hearing is not sufficient to provide adequate post-termination due process, where state remedies do not include reinstatement, and therefore that the Board of Education was required to provide a full trial-type pre-termination hearing. This analysis was based upon a holding that the Plaintiff had an intangible property right to "remain[] in office" (App. 12a) that was not sufficiently protected by a breach of contract action.

Even though no federal court had ever previously held that a breach of contract action is insufficient post-termination procedure in an employment case, the Court also concluded that Baird's right to a full trial-type proceeding prior to termination was so clearly established as to deny qualified immunity to the individual Board members named as defendants. The Court also concluded that, even though the employee had refused to attend his pre-termination hearing, he had not waived his right to challenge it.

REASONS FOR GRANTING THE PETITION

In this case, the Seventh Circuit concluded that state court judicial review of a termination is insufficient post-termination process within the meaning of *Loudermill*, where reinstatement is not available as a remedy. Accordingly, the Court held that a public employer must provide full trial-type pre-termination procedures of its own in addition to defending itself in court. No other court has held that a trial in state court is insufficient to constitute adequate post-termination process for a public employee. The Court's decision rests on the erroneous assumption that due process protects not only a public

employee's economic interest in his employment, but also separately protects purely dignitary and non-pecuniary dimensions of employment. The Court's decision here creates a new right to "remain in office" requiring a remedy of reinstatement, separate and apart from a right to be compensated for any losses the employee suffers.

The Seventh Circuit's decision should be reviewed by this Court because its ruling, which directly contravenes Supreme Court precedent both on the merits and on the issue of qualified immunity, raises significant potential new liabilities for public bodies and individual public officials throughout the country. The decision also creates a clear conflict among the Circuits on the question whether the non-economic benefits of government employment are separately protected property interests. On the merits of the procedural due process claim, the Seventh Circuit's ruling disregards the teachings of cases from *Loudermill* to *Gilbert v. Homar*, 520 U.S. 924 (1997) and announces a sweeping new rule of law whose premises conflict with the holdings of other circuits, as well as other decisions of its own court. On the qualified immunity question, the Seventh Circuit has ignored this Court's fundamental precedents, denying qualified immunity to individual school board members without identifying any precedent or ruling that would have suggested that its novel holding approaches the "clearly established" standard demanded by this Court.

A. Because the Seventh Circuit's Decision Imposes Significant New Liabilities on Public Bodies and Public Officials, This Case Raises Issues of Critical Importance

The new requirements of procedural due process announced by the appellate court present an issue of critical importance to school districts and other public bodies throughout the country, as the decision has drastically altered the landscape of

procedural due process. By its ruling, the appellate court, for the first time, imposed the burden of a full trial-type pre-termination hearing on thousands of public bodies seeking to terminate contractual employees, at least in the vast majority of states, where state contract law does not include the remedy of reinstatement for a breach of contract claim. Since virtually all superintendents and senior level municipal, regional and state administrators, both in school districts and other public bodies, are employed through employment contracts, not through civil service or tenure systems, this decision will have a profound impact on thousands of government entities and employees.

The Seventh Circuit's opinion also raises substantial federalism concerns. The contract law of most states, based as it is in common law, does not give employees suing for breach of contract a right to reinstatement. See e.g., S. Williston, Treatise on the Law of Contracts § 67:102, p. 568 (Richard Lord, author, 4th Ed., 2002). Thus, the Seventh Circuit casually dismissed state courts throughout the country as incapable of providing adequate post-termination relief to contractual employees. This holding flies in the face not only of repeated statements by this Court of the dignity to be accorded state court proceedings, but of the doctrine of federalism itself. The property interest in this case was created simply from an employment contract between the school board and the superintendent. By holding that the state law breach of contract action was not adequate post-termination process, the Seventh Circuit has removed from the states their right to determine for themselves the appropriate remedies to be accorded for the breach of employment contracts, a traditional area of state authority, thus creating a fundamental, and unjustified shift of power from state to federal courts. As the Third Circuit has commented "a wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause." *Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989).

The Seventh Circuit's opinion also raises important questions of qualified immunity, by depriving public officials of immunity for being unable to foretell the court's pronouncement of this new right to remain in one's position. In its opinion, the appellate court itself acknowledged that only "a fine line distinguishes factual scenarios in which a judicial remedy for breach of contract is adequate [post-termination process] from those in which it is not." 389 F.3d at 691. The court then failed to identify a single prior case in which the factual scenario it confronted, the adequacy of a breach of contract claim as post-termination relief in an employment context, had ever been decided. Indeed, no such prior case exists. Qualified immunity serves several important purposes – "it allows officials to carry out their duties confidently, without fear of incurring unexpected liability, and it allows courts to dispose of insubstantial claims prior to trial, sparing officials from unnecessary litigation." *Pounds v. Griepenstroh*, 970 F.2d 338, 340 (7th Cir. 1992). The appellate court here ignored those compelling purposes, and imposed liability on board members who, it held, guessed wrongly on which side of the "fine line" their situation fell. Such a ruling puts all local public officials at risk. This not only impacts current officials, who may be chilled in carrying out their duties, but also discourages other citizens from running for public office at all. Thus, this decision raises issues of paramount importance, and should be reviewed.

B. The Seventh Circuit's Decision Conflicts With Decisions of Other Courts of Appeals

The Seventh Circuit's conclusion, that the non-pecuniary elements of a public employee's job require the availability of a remedy of reinstatement, separate and apart from the right to compensation for monetary losses, conflicts with numerous decisions of other courts of appeals. In these cases, dealing with suspensions with pay, contract pay-outs and unilateral job

transfers, the courts have repeatedly denied claims for violation of due process, finding that, so long as compensation is awarded, due process is satisfied. *Holloway v. Reeves*, 277 F.3d 1035, 1039 (8th Cir. 2002); *Harris v. Board of Education of the City of Atlanta*, 105 F.3d 591 (11th Cir. 1997); *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992); *Royster v. Board of Trustees of Anderson County School District*, 774 F.2d 618 (4th Cir. 1985). This Court suggested as much in *Loudermill* itself, noting that the public employer could have avoided the need for any pre-termination procedures if it had imposed a suspension with pay. Such a determination would not be possible if the Seventh Circuit's newly created right to remain in office were in fact a cognizable right.

Numerous decisions, from this Court and the appellate courts, have rejected the Seventh Circuit's premise, holding that the federal due process clause does not protect one's right to continue serving in a particular job. *Loudermill*; *Gilbert v. Homar*, 520 U.S. 924 (1997) (re-emphasizing *Loudermill*'s language regarding suspensions with pay, and holding that not even all suspensions without pay require pre-termination process); *Holloway v. Reeves*, 277 F.3d 1035 (8th Cir. 2002); *Harris v. Board of Education of the City of Atlanta*, 105 F.3d 591 (11th Cir. 1997); *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992); *Royster v. Board of Trustees of Anderson County School District*, 774 F.2d 618 (4th Cir. 1985). Each of these Court of Appeals cases involved claims by a school superintendent that he was entitled to due process before the non-economic elements of his job could be taken from him. In each case, the court specifically rejected that claim, finding that only economic benefits of the position

are protected property interests. The Seventh Circuit's opinion in this case stands in direct conflict to each of these holdings.[3] For example, the Fifth Circuit, in *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992), considered the case of a superintendent removed from his position, but paid out on the monetary portions of his contract. The superintendent argued that he was entitled to due process before the paid removal from his position. The Court of Appeals flatly rejected that contention, concluding that an employee has no protectible interest in holding the position of superintendent, unless such an interest was specifically created by state statute, a situation present neither in *Kinsey* nor in this case. The court concluded that, by receiving the compensation to which he was due, Kinsey had received all that he had a right to claim under his contract. Likewise, in this case, if the employee recovers for the asserted breach of contract, he will have received all that he had a right to claim under his contract.[4]

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[3] The Seventh Circuit's decision here similarly conflicts with the previous decisions issued by that Court itself. *See Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 524 (7th Cir. 2000), *Crim v. Board of Education*, 147 F.3d 535 (7th Cir. 1998), and *Swick v. City of Chicago*, 11 F.3d 85 (7th Cir. 1993). The Court held in all three of those cases that due process does not protect "the purely dignitary or otherwise nonpecuniary dimensions of employment," *Bordelon*, 233 F.3d at 530; *Crim*, 147 F.3d at 546; *Swick*, 11 F.3d at 87. *See also Ulichny v. Merton Comm. Sch. Dist.*, 249 F.3d 686, 702 (7th Cir. 2001) (no protected property interest in performing the duties of principal).

[4] In this case, the Board contends that the contract was not breached; that it was entitled to terminate the contract pursuant to section E1, which allows termination for cause. (App. 53a). If there is cause for termination, then the employee is entitled to recover no additional compensation.

In *Holloway v. Reeves*, 277 F.3d 1035, 1039 (8th Cir. 2002), the appellate court specifically addressed the reasons why a superintendent has no protectible interest in the non-economic aspects of his employment contract: "no superintendent could 'legitimately' expect to continue in that position at *any* school district beyond the pleasure of the school board, as school boards and other public bodies frequently 'buy out' the contracts of top managers. Any alleged property interest in a public policy-making position itself, that is, in addition to being paid, if it were recognized, would severely limit the right of the electorate, through its chosen representatives, to control the operation of public institutions." It is precisely these concerns that the Seventh Circuit disregarded in creating this new property interest.

The conflict raised here is one that should be resolved by this Court. This is not simply a theoretical concern; it is one of practical and frequent significance. Literally thousands of public school districts and municipalities, and their superintendents and other contractual employees, confront this question regularly, as these local governments determine what pre-termination process they must provide in dismissal situations. The current state of the law leaves them unsure how to proceed, and many public employers may expend significant amounts of time and taxpayer dollars holding full trial-type pre-termination hearings they are not constitutionally required to hold. *Cf.*, *Beischel v. Stone Bank School District*, 362 F3d. 430 (7th Cir. 2004) (12-hour, all-night pre-termination hearing of superintendent). Accordingly, the petition for certiorari should be granted.

C. The Seventh Circuit's Decision Contains Significant Errors of Law.

1. A Post-Termination Breach Of Contract Action Is Constitutionally Sufficient Post-Termination Process For A Contractual Employee

The Court of Appeals in this case held that a pre-termination *Loudermill* hearing, coupled with a post-termination action for breach of contract, is insufficient process for a contractual employee as a matter of constitutional law, unless reinstatement is available as a remedy. This conclusion – the first of its kind in the country – is a stark departure from well-settled law defining the procedural due process rights of public employees.

By virtue of his contract with the Board, the employee in this case had a protected property interest in his employment and the Board could not deprive him of that interest without due process. *Loudermill*, 470 U.S. at 542. This Court held in *Loudermill* that a public employee who is provided with a full evidentiary post-termination hearing is entitled only to notice, a summary of charges, and an opportunity to be heard prior to termination. *Loudermill*, 470 U.S. at 546. In *Loudermill*, the Court explained that a public employee who enjoys a property interest in continued employment must be afforded "some opportunity ... to present his side of the case." *Loudermill*, 470 U.S. at 543. *"To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id.* at 546.

The Board here provided the employee with a pre-termination hearing that far exceeded these requirements. The employee was given the opportunity to present his case at a hearing; to present evidence and witnesses; to cross-examine

witnesses; to testify himself as to what absent witnesses might say; and to bring a legal representative to the hearing. In addition, the employee had available as post-termination process the full judicial process attendant to a state court action for breach of contract – not just "trial-type" procedures, but an actual trial.

The Seventh Circuit's conclusion that the employee's post-termination remedy must include a right to reinstatement is based on a misunderstanding of the phrase "present entitlement," as used in this Court's decision in *Arthur S. Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 190, 196 (2001). In *Lujan*, this Court held that the state could provide *no* pre-termination process, and simply provide post-termination judicial process through a breach of contract action, to independent contractors from whom certain payments had been withheld. The Court noted that due process did not always include a right to pre-termination as well as post-termination process. The Court cited two earlier cases in which it had held post-termination process without any pre-termination process was sufficient, where employment claims had been at issue. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979). In those cases, although no pre-termination process had been provided, sufficiently prompt post-termination relief was adequate even absent pre-termination process. *Barchi* and *Mallen* stand for the proposition that in those rare circumstances when *no* pre-termination process is given an employee with a property interest in his position, post-termination relief must be exceptionally prompt.

The Court noted that, because the plaintiff in *Lujan* was not "presently entitled" to "exercise ownership dominion over real or personal property, or to pursue a gainful occupation," *Lujan*, 532 U.S. at 196, the lack of pre-termination process was not fatal, similar to the holdings in *Barchi* and *Mallen*. Nothing in

Lujan, Barchi, or Mallen suggests that a post-termination contract remedy, when coupled with substantial pre-termination process, is insufficient to protect the rights of terminated contractual employees, whether or not that contract remedy includes reinstatement. To the contrary, this Court, in *Lujan* and other cases, has strongly endorsed the ability of state courts to protect rights created by contract. *Lujan*, 532 U.S. at 197.

The Court of Appeals decision in this case, however, turns *Lujan* on its head. The appellate court read the phrase "present entitlement" to mean that the public employee has a right to "remain[] in office," separate and apart from his right to be compensated for the alleged breach of his employment contract. App. 12a. This right, according to the court, could not be compensated by damages, but rather, requires the availability of a remedy of reinstatement. This right arises, apparently, because the holding of a particular position is so important, according to the Seventh Circuit, that post-termination relief is insufficient unless reinstatement is available as a remedy.

The new rule announced by the Seventh Circuit amounts to a determination that ordinary contract remedies do not satisfy due process, even when the property interest arises solely from a contract, and instead requires a federal approval of each remedial element. Thus, the breadth of remedies (as opposed to the type of process) available ex post define the amount of process ex ante. The Seventh Circuit now demands that, to satisfy *Loudermill*, the remedial options include reinstatement. The next federal court might require the inclusion of attorneys' fees. A third might demand that damages not include a mitigation requirement. Clearly, due process does not require the federalization of state contract law and state court practice. Indeed, *Loudermill* itself makes this clear. This Court noted that the post-termination relief granted to one of the plaintiffs, Donnelly, did not include back pay, and the Sixth Circuit had

determined that the reviewing commission had lacked the authority to award such compensation. 470 U.S. at 537, n.1. Even though Donnelly could not thus fully be made whole, as he would only get reinstatement without back pay, this Court found that this proceeding would be sufficient post-termination relief, coupled with limited pre-termination process. Due process would be satisfied even where Donnelly was not fully made whole; it therefore must be satisfied where the employee in this case can be fully made whole, with back pay for the entire duration of his contractual term.[5] Nothing in *Lujan*, or any other decision of this Court, should have led the Seventh Circuit to conclude otherwise.

It is important to recognize that the employee's property interests here were created and defined solely by his employment contract with the Board, which entitled him to a three-year term of employment. Illinois law specifically provides that school superintendents are not entitled to tenure when serving under a multi-year employment contract, 105 ILCS 5/10-23.8, and the employment contract included a specific provision to the same effect. Nothing in the Illinois School Code creates any claim of entitlement to the non-monetary aspects of the superintendent's position, and the employee in this case pointed to no such statutory entitlements in pleading his case. Furthermore, under Illinois law, as is true in most states, the proper remedy for breach of an employment contract is an action for damages, not an action seeking reinstatement. *Bessler v. Board of Education*, 69 Ill.2d 191,

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[5] For a tenured civil servant, monetary compensation, for only a limited period, does not fully compensate for the loss of a position that could have continued indefinitely. In the present case, by contrast, the employee had a contract for a fixed period of time, and so the calculation of the full scope of his monetary losses is clear.

198-99, 370 N.E.2d 1050, 1053-54, 13 Ill.Dec. 23, 26-27 (1977); *Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill.App.3d 901, 904-05, 392 N.E.2d 126, 128-29, 29 Ill.Dec. 569, 571-72 (1st Dist. 1979).[6] Thus, the Panel's decision awards the employee a remedy that his state-created property interest never provided.[7]

The Seventh Circuit erred by finding that due process requires a full trial-type pre-termination hearing for this contractual public employee, simply because his post-termination relief, a full state court trial on his breach of contract claim, did not include the remedy of reinstatement. This decision, which was based on an apparent misinterpretation of this Court's decision in *Lujan*, not only conflicts with established precedent in other circuits, it undercuts the state's

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[6] It is also significant that the employee has *never* sought reinstatement to his position. Indeed, the complaint – which was filed June 25, 2001, less than six weeks after his employment had been terminated – sought only money damages.

[7] The court also held, apparently as a matter of law, that state court legal proceedings could never provide sufficiently prompt relief. Such a finding is as unjustified as it is novel. This Court and others have held that even a one-year delay satisfies due process, *Loudermill*, 470 U.S. 532 (1985); *DeVito v. Chicago Park District*, 972 F.2d 851, 857-58 (7th Cir. 1992). There is no evidence in the record that the employee in this case could not have pursued his action for breach of contract in Jo Daviess County, a small county in Western Illinois, where it was filed, within an equivalent timeframe. Although the Court claims to look to *Lujan*, 532 U.S. at 196, as a basis for its decision, nothing in *Lujan* suggests such a result – to the contrary, *Lujan* endorses the constitutional sufficiency of state contract actions as adequate post-termination proceedings.

right to establish the parameters of its own contract law. For these reasons, the Court should grant the petition for certiorari.

2. The Denial of Qualified Immunity Directly Violates This Court's Consistent Requirement of a "Clearly Established" Constitutional Violation

After announcing its novel holding that a state court breach of contract action is insufficient post-termination process for *Loudermill* purposes, the Seventh Circuit concluded that this new proposition was a "clearly established" constitutional right. As a result, it held that the school board's decision to provide a Loudermill-type pre-termination hearing violated that clearly established right, and denied qualified immunity to the individual board members. That ruling plainly contravenes this Court's decisions on qualified immunity, from long-standing precedents such as *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987) to more recent decisions in *Saucier v. Katz,* 533 U.S. 194 (2001) and *Brousseau v. Haugen,* 125 S.Ct. 596 (2004).

In *Saucier*, this Court emphasized that questions of qualified immunity must be resolved through a careful two-part analysis. In particular, the second part of this analysis – whether a public official has violated a "clearly established" right – "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. The Seventh Circuit's analysis completely disregards this requirement. The decision denied qualified immunity to the individual defendants because "numerous cases from *Perry v. Sindermann* to *Loudermill* to *Lujan* ... have defined the contours of what process is due to a public employee who is to be terminated." App. 20a. Notwithstanding "the quality and volume of this precedent," *id.*, none of that precedent concerned the "specific context" here. The issue was not whether the

employee was generally entitled to due process, or even whether he was entitled to some kind of a hearing. The issue the Court of Appeals was to decide was whether a reasonable school board member should have been able to discern that the available judicial process was insufficient post-termination process under *Loudermill*.

No reported decision before the Seventh Circuit's opinion here had held that judicial process through an action for breach of contract fails to satisfy *Loudermill*'s requirement for adequate post-termination process. In fact, as noted in Sections B and C1, *supra*, prior holdings of this Court and other Courts of Appeals should have led to the opposite conclusion. Similarly, the district court, reviewing the same precedent and facts as the appellate court, had specifically concluded that the state court remedy was sufficient, and granted summary judgment to the Defendants. Furthermore, in other contexts, a breach of contract remedy has been specifically approved as adequate post-termination protection for a property right created by contract. *Lujan*, 532 U.S. at 197; *cf. Strasburger v. Board of Education*, 143 F.3d 351, 358 (7th Cir. 1998).

The question, quite simply, is whether it would have been apparent to local school board members that a pre-termination *Loudermill* hearing was insufficient pre-termination process when the post-termination process available was a full trial in state court on the employee's breach of contract claim. The answer is equally simple: it would not have been apparent. The Seventh Circuit's own opinion acknowledges the area to be "elusive" and "mysterious" and the circumstances dividing cases where state breach of contract claims are sufficient for due process purposes from those where it is not as a "fine line." App. 8a. The situation is virtually identical to that in *Brousseau v. Haugen*, decided by this Court earlier in the term, in which qualified immunity was deemed appropriate where the area of

law "is one in which the result depends very much on the facts of each case," and where the defendant's actions fell into a "hazy border", much like the "fine line" the Seventh Circuit noted here. 125 S.Ct. at 600.[8]

The Court's denial of qualified immunity thus violates the requirements of *Saucier*, as it was premised upon a level of generality not appropriate when analyzing qualified immunity. The Court relied on *Loudermill*, *Perry v. Sindermann*, and *Lujan* to support its conclusion that the requirement of an available reinstatement remedy was clearly established. Neither *Loudermill* nor *Perry* addressed the specific context at issue here – the adequacy of a post-termination breach of contract claim – and *Lujan* held, albeit in a different context, that post-termination breach of contract relief is sufficient even where no pre-termination process is offered. Thus, the cases cited by the Court of Appeals could not ensure that "a reasonable official would understand" that a breach of contract suit, with the full protections of a state court judicial proceeding, was not sufficient post-termination process, because reinstatement would

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[8] The Court's decisions denying qualified immunity in *Groh v. Ramirez*, 540 U.S. 551 (2004) and *Hope v. Pelzer*, 536 U.S. 730 (2002), similarly required a level of "apparentness" in the state of the law not present here. In *Groh*, where the issues involved the facial invalidity of a search warrant, the Court looked at the significant body of law -- the particularity requirement itself is set forth in the Constitution, the rule against warrantless searches of homes was well-articulated by the courts, and the defendant's own department had a rule prohibiting the conduct alleged – to conclude that the law was clearly established. In *Hope*, prior case law, a Department of Justice report and the Department of Corrections' own regulations all identified the practice in question as wrongful. No such prior precedent exists in this case.

not be available as a remedy. *Anderson v. Creighton,* 483 U.S. at 640.

The Seventh Circuit's decision not only disregards the legal principles governing qualified immunity, it undermines the purposes of the protection as well. This Court noted in *Anderson* the significant social costs imposed by damages actions against public officials: "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." 483 U.S. at 638. In this case, the public officials are local school board members, from a small town, serving their community for no compensation. To deny qualified immunity under the circumstances of this case, in a developing area of law, is to ask such volunteers to jeopardize their homes, their futures and their families' financial well-being. The doctrine of qualified immunity was intended specifically to shield our public officials from such risks.

CONCLUSION

The Court of Appeals decision in this matter dramatically changes the landscape for all public bodies in the country, in direct contravention of pre-existing law. Its ruling vastly expands the hearing rights of contractual employees and dramatically burdens local governing bodies seeking to remove employees they consider unsatisfactory. Moreover, even if this new pronouncement should be incorporated now into the legal principles of due process, in no manner was this settled law disqualifying the Board of Education members from qualified immunity.

For the reasons stated above, therefore, the Board of Education and its individual board members respectfully request that this Court grant the petition for *certiorari*.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-3630
[Decided: December 29, 2004]

KELLY BAIRD,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT No. 205, et al.,
Defendants-Appellees.

Before: Hon. Richard D. Cudahy, Circuit Judge, Hon. Ilana Diamond Rovner, Circuit Judge, Hon. Ann Claire Williams, Circuit Judge.

ORDER

On consideration of the petition of Defendants-Appellees for rehearing with suggestion for rehearing *en banc* filed November 24, 2004, in the above-captioned case, all of the judges on the original panel have voted to deny rehearing and none of the active judges on the court have voted for a rehearing en banc.

Therefore, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-3630

[Decided: November 12, 2004]

KELLY BAIRD,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205, JO DAVIESS COUNTY, ILLINOIS, MONICA STEPHAN, ANALISA CLEARY, JUDY GATES, MARY VINCENT, JOSEPH GREEN, DONALD HILL, and ROBERT LETHLEAN,
Defendants-Appellees.

Before: CUDAHY, ROVNER and WILLIAMS, Circuit Judges.

OPINION

CUDAHY, *Circuit Judge*. Here we confront the question whether a state breach of contract action provides adequate due process to protect the rights of a school superintendent

facing termination, whose pre-termination hearing fell short of due process requirements. For the reasons to be set forth, we conclude that, in the circumstances presented, it does not. We also hold that the superintendent to be terminated did not waive his procedural due process claim by attending his pre-termination hearing only to object to its procedures. Accordingly, we reverse.

I.

The parties to this conflict are the dual centers of authority that guide public education throughout the country. On the one hand is the school board, representing the people, and on the other hand, the school board's selected operating leader of the schools, the superintendent. In 2000, plaintiff Kelly Baird was hired by the Warren County School District No. 205 Board of Education to serve as Superintendent and Principal under a three-year contract that provided he could be dismissed only "for cause." (Superintendent/Principal Employment Contract at A.7.) The contract broadly defined "cause" as "any conduct, act, or failure to act by the Superintendent which is detrimental to the best interests of the School District." (*Id.* at A-8.) The contract also provided that reasons for discharge were to be given in writing to the Superintendent, who would then be entitled to notice and a pre-termination hearing before the Board to discuss the merits. (*Id.*)

Early in the school year, Baird found himself under close scrutiny by certain Board members, who in conjunction with their observations, began to collect a variety of deprecatory comments about Baird and his activities from secretaries, teachers and other district employees. This on-the-sly investigation of the new Superintendent continued throughout the school year until April of 2001, when the accumulated

tidbits of derogation were distilled into the form of Baird's annual performance review. Pursuant to the contract, on April 18, 2001, the Board presented Baird with its evaluation of his performance and a letter that notified him of its intent to terminate him for cause for the reasons contained in the evaluation and advised him of a hearing to consider his termination to take place on May 16, 2001.

Upon receiving this letter, Baird contacted his attorney, who promptly responded to the Board by letter requesting a continuance, copies of underlying documents, the names of individuals who had provided information included in the employment evaluation and the recusal of certain "biased" Board members who had led the investigative efforts against Baird. The Board in its reply denied these requests and stated further that it would not call witnesses, that it would not identify the individuals whose claims had provided the substance of the employment evaluation, that it could not compel any district employees to attend the hearing, that Baird was only entitled to "notice and the opportunity to be heard" and that Baird could question Board members only as to issues about which those members had spoken. In the final communication between the parties, which took place on the day of the hearing, Baird's attorney objected to the hearing procedures specified by the Board as unfair. That evening, when the Board convened to discuss his termination, Baird appeared with his attorney to protest what he claimed to be contractual and due process violations, and he then departed. The Board proceeded to consider Baird's termination in his absence, and predictably voted to end what had become an acrimonious employment relationship. Thereafter, it forwarded to Baird a copy of its Resolution of Termination.

Having been fired without receiving what he considered to be a fair hearing, Baird brought an action in state court

seeking damages against the Board pursuant to 42 U.S.C. § 1983, alleging that the Board's termination procedures violated his right to procedural due process. Baird claimed that certain Board members were biased against him and could not have served as neutral decision makers. He also asserted a breach of contract claim under Illinois law. After the Board removed the case to federal court, Baird filed a motion for partial summary judgment as to liability on his due process claim alleging an insufficient hearing, and the Board and Board members filed a motion for summary judgment on all claims. Thus, there were cross-motions on all issues save the issue of biased decision makers.

The district court granted the Board's motion and declined to exercise supplemental jurisdiction over Baird's common law breach of contract claim, remanding it back to state court. Citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the District Court stated that, provided there was a full due process hearing after termination, a pre-termination hearing need only provide notice of the charge, an explanation of the basis of the charge and an opportunity to respond. Baird's pre-termination hearing had satisfied these requirements. The district court concluded that here the state suit for breach of contract met due process requirements. In addition, the district court rejected Baird's allegations of bias, finding that his evidence had not overcome the presumption that Board members were acting in the public interest and that their concerns had stemmed from Baird's job performance and not personal animosity.

The issue here is whether a state breach of contract suit provides due process if the pre-deprivation hearing does not. We also turn to the question whether a public employee waives the right to challenge a pre-termination hearing on due

process grounds when he attends the hearing only to object to its procedures.

II.

In reviewing a grant of summary judgment, we review the district court's determination *de novo*. *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474, 1477 (7th Cir. 1990).

A.

We agree with the district court's determination that the Board members' decision to terminate Baird was not tainted with bias. While the conduct of certain Board members appears to have been petty and maladroit, this seems to have been more a matter of modus operandi and style than of substantial prejudice. We are not persuaded, however, that the Board's procedures were entirely fair. The truncated pre-termination hearing afforded to Baird could comport with due process only if he received full due process promptly after termination. The error here was in determining under what circumstances a breach of contract suit can afford due process.

There can be no due process without "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). A hearing "appropriate to the nature of the case" must precede the "deprivation of life, liberty or property." *Loudermill*, 470 U.S. at 541 (internal citations omitted). A court considering what process is due in a specific situation must weigh three factors: "first, the private interest that will be affected by the

official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

1.

The Supreme Court has long recognized that a public employee can have a constitutionally protected property interest in continued employment; such interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Colburn v. Tr. of Indiana Univ.*, 973 F.2d 581, 589 (7th Cir. 1992) ("Property interests exist when an employer's discretion is clearly limited so that the employee cannot be denied employment unless specific conditions are met."). Applying the *Mathews* test to determine that terminated school district employees were not entitled to full pre-termination hearings in *Loudermill*, the Supreme Court stated that a pre-termination hearing need only be "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 546. The Court's holding, however, rested on the fact that the terminated employees were entitled to a post-termination hearing before the Ohio Personnel Board, and the Court cautioned that "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures." *Id.* at 546-47.

Our own Seventh Circuit precedent likewise establishes that, when there is an opportunity for a full post-termination hearing, due process does not require an employer to provide full "trial-type rights" such as the right to present or cross-examine witnesses at the pre-termination hearing. *Staples v. City of Milwaukee*, 142 F.3d 383, 387 (7th Cir. 1998). *See also Head v. Chicago Sch. Reform Bd. of Tr.*, 225 F.3d 794, 803 (7th Cir. 2000) (when full post-termination procedures are available, public employer must provide a public employee with a protected property interest with pre-termination notice, explanation of evidence and a chance to tell his side of the story).

The issue in the case before us is whether a post-termination lawsuit for breach of contract can remedy the full due process deficiency in the pre-termination proceedings. *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001), is the leading Supreme Court case addressing this question. With respect to *Lujan*, the question of when a judicial remedy like this provides adequate post-termination due process, as the district court found, is elusive. A fine line distinguishes factual scenarios in which a judicial remedy for breach of contract is adequate from those in which it is not. Not all injuries are equal, and not all parties can be made whole through a breach of contract action. The somewhat obscure quality that separates one from the other is important and yet eludes precise definition. The Supreme Court has referred to this mysterious element as a "present entitlement," and identifies cases involving this factor as ones in which "the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Lujan*, 532 U.S. at 196. *See also DeBoer v. Pennington*, 287 F.3d 748, 750 (9th Cir. 2002) (quoting *Lujan's* definition of "present entitlement")

and Canby, J., concurring (distinguishing *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), which involved, like the present case, the due process protection of a personal property interest in employment).

A present entitlement is immediately distinguishable from the contractual interests dealt with in *Lujan* and its progeny. In *Lujan*, the state of California withheld funds from a public works subcontractor and imposed penalties after receiving notice that the subcontractor had violated provisions of the state Labor Code. The Supreme Court characterized the subcontractor's interest as merely a contractual interest, a "deprivation of payment that it contends it is owed under a contract" that could be adequately protected through a breach of contract suit. *Lujan*, 532 U.S. at 196. Moreover, the Supreme Court contrasted the subcontractor's interest with two illustrative examples of present entitlements in the employment context:

> In *Barchi* [*Barry v. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979)] we held that a racetrack trainer suspended for 15 days on suspicion of horse drugging was entitled to a prompt post-deprivation administrative or judicial hearing. 443 U.S. at 63-64. And in *Mallen*, [*FDIC v. Mallen*, 486 U.S. 230 (1988)] we held that the president of a Federal Deposit Insurance Corporation (FDIC) insured bank suspended from office by the FDIC was accorded due process by a notice and hearing procedure which would render a decision within 90 days of the suspension. 486 U.S. at 241-243. See also *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (holding that due process requires notice and a hearing before wages may be garnished).

Id.[1] The postdeprivation remedies appropriate to the deprivation of an interest to which there is a present entitlement are characterized by promptness and by the ability to re-store the claimant to possession. The underlying concept seems to be that the remedy is available before the loss has become complete and irrevocable.

A state law breach of contract action is not an adequate post-termination remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pre-termination hearing. *Id.* While it does provide a species of due process, a lawsuit does not satisfy the requirement of promptness, which is essential if the employee is to pursue time-sensitive remedies such as rein-statement. While there is no specific time frame within which a hearing must be held to qualify as "prompt," lack of a speedy resolution to proceedings may result in a denial of due process. *Loudermill*, 470 U.S. at 547. *See also DeVito v. Chicago Park Dis.t*, 972 F.2d 851 (7th Cir. 1992) (holding that post-termination hearing must be "prompt" and that, under guidelines for determining promptness for post-suspension hearing enunciated in *FDIC v. Mallen*, 486 U.S. 230 (1988), a year's delay in holding a post-termination hearing did not deny terminated public employee due process). Similarly, while there is no automatic right to

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[1] Similarly, in applying *Lujan's* holding to the property interest of the former managers of a city-owned cemetery whose management contract was terminated by the city, the Ninth Circuit reasoned that because the "contract here has not given rise to greater interest than the contract itself," the deprivation was a mere contractual injury that could be adequately protected by a state breach of contract suit. *DeBoer*, 287 F.3d at 750.

reinstatement, it is "normally an integral part of the remedy for a constitutionally impermissible employment action." *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1101 (5th Cir. 1987).[2] *Cf. United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340 (7th Cir. 1991) ("Reinstatement and back pay awards are common remedies in wrongful discharge cases."). Further, as the Sixth Circuit has noted, "employment, especially in a career such as education, is more than a way to make money; it is a profession with significant non-monetary rewards," and consequently money damages may be a "hollow victory." *Banks v. Burkich*, 788 F.2d 1161, 1164 (6th Cir. 1986) (citing *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982)). Thus, when a public employee terminated for cause has a present entitlement, and when the only avail-able post-termination remedy is the opportunity to bring a state breach of contract suit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and an opportunity to be heard.

2.

After reviewing the facts of this case, we conclude that Baird has established his present entitlement. Baird's interest is distinguishable from those in *Lujan* and its progeny; he was terminated in the first year of a three-year contract, and had

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[2] While *Reeves* involved a teacher challenging a reassignment on the grounds that it violated the First Amendment, the Fifth Circuit's treatment of reinstatement applies here as well.

a protected property interest in remaining in office under his contract for its full term and in being compensated accordingly.[3] *See Lujan*, 532 U.S. at 196. Baird's present entitlement also meant that he was entitled to pursue reinstatement promptly if his rights had been violated. Accordingly, the Board was obligated to provide a pre-termination hearing that fully complied with due process. This it failed to do.

The Board takes credit for "generous" pre-termination hearing procedures to a degree such that one might envision the proceedings as a veritable cornucopia of due process protections. In reality, however, the Board's gestures seem to have been just that--gestures. While Baird was ostensibly afforded the opportunity to call and question witnesses, the Board effectively emasculated this provision by refusing to furnish him with the names of district employees who had acted as undercover school board informants. Baird was also allowed to question Board members--but only about matters as to which they had spoken. What the Board gave to Baird with the left hand, it seemed to take away with the right, leaving Baird with a pre-termination hearing that may have satisfied a bare-bones *Loudermill* standard, but little else. [4]

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[3] Because we have held that a pecuniary loss is an actionable deprivation of property, we need not reach the issue whether the termination's adverse effect on Baird's future employment prospects is also an actionable deprivation. *Head*, 225 F.3d at 803 (citing *Swick v. City of Chicago*, 11 F.3d 85, 86-88 (7th Cir. 1993)).

[4] This finding is supported by an application of the factors enunciated in *Mathews*. The threat of loss of livelihood coupled with an opportunity to promptly pursue reinstatement are the primary private concerns of a public employee who stands to be terminated, although the impact of a 'for cause' termination on

And the Board has offered no reason why more generous measures under the *Mathews* criteria might have been difficult or impossible to supply.

We are aware that Baird presumably does not *now* as a practical matter pursue reinstatement as a remedy. However, this does not alter our analysis. The kind of remedies that conform to due process must be available promptly and must generally include the possibility of reinstatement. Otherwise they are not adequate to address the loss of a present entitlement.

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future employment prospects is serious as well. A public employee has a right to verify the accuracy of the purported cause(s) of termination. The opportunity to confront and cross-examine accusers, a cornerstone of our adversary system, assists in resolving disputes over facts giving rise to the termination or indeed over whether the termination itself is merited, and so is key to preventing the deprivation of a constitutionally protected property interest. While the right to confront and cross-examine witnesses is not absolute in the civil context under *Catlett v. Woodfin*, 13 Fed. Appx. 412 (7th Cir. 2001), such an opportunity must be afforded to terminated public employees with present entitlements, whose pre-termination hearings must fully comport with due process when no other procedural safeguards exist. Finally, it is expensive and time-consuming to hire and fire, and so the government also has an interest in verifying that the purported "cause" of termination is legitimate. It is more efficient to ensure that a pre-termination hearing comports with due process when an employee to be terminated "for cause" possesses a present entitlement than it is to defend a lawsuit.

3.

In reaching this conclusion, we find persuasive the reasoning of, *McClure v. Independent School District No. 16*, 228 F.3d 1205 (10th Cir. 2000), in which a principal terminated under a one-year contract was afforded only a minimal pre-termination hearing in which the district attorney presented live witnesses and sought to introduce accusatory affidavits from identified district employees. The Tenth Circuit found that the terminated principal was entitled to confront and cross-examine those individuals "whose work deprives a person of his livelihood." *McClure*, 228 F.3d at 1211. *McClure* underscores the importance of cross-examination here, for the opportunity for confrontation was even more fully denied here where Baird was deliberately prevented from ascertaining the identities of his accusers.

Moreover, Seventh Circuit precedent is to the same effect. We have never held that a state breach of contract action provides a terminated public employee with adequate due process *when that employee possessed a present entitlement*. The present case is immediately distinguishable from other cases cited by the Board. The Board's invocation of *Strasburger v. Board of Education, Hardin County Community Unit School District*, 143 F.3d 351 (7th Cir. 1998), is simply not persuasive since *Strasburger*, primarily concerned with substantive due process, essentially held that a terminated public employee challenging his termination on procedural due process grounds need only show that he had been deprived of a protected interest and that there had been a failure of due process. *Id.* at 358. Where a present entitlement is involved, a post-deprivation breach of contract suit cannot adequately remedy due process deficiencies.

The Board's reliance on *Schacht v. Wisconsin Department of Corrections*, 175 F.3d 497, 503 (7th Cir. 1999), and *Papapetropoulous v. Milwaukee Transport Services, Inc.*, 795 F.2d 591 (7th Cir. 1986), is similarly unavailing. *Schacht* is inapposite because in that case we held that a terminated prison guard possessed adequate due process remedies under Wisconsin law because he could pursue reinstatement, backpay, attorneys' fees and costs through the Wisconsin Personnel Commission. 175 F.3d at 503. *Papapetropoulous* involved a terminated bus driver who was held not to have been denied due process when a federal arbitrator cut short his cross-examination of an emotionally distraught witness in a federal pre-termination arbitration hearing convened under union guidelines. 795 F.2d at 598-600. We stated in the purest dicta that a plaintiff with a protected property interest who has an adequate state remedy is not deprived of due process, and noted that the driver could have brought a breach of contract action in state court against his employer. *Id.* at 601 n.14. *Papapetropoulous*, which clarified when a contract suit is adequate, predates *Lujan* by fifteen years and is distinguishable on several grounds: it reviewed an arbitrator's decision in a pre-termination hearing held pursuant to a union contract; Papapetropoulous did not challenge the adequacy of a state breach of contract action as a post-termination remedy and was afforded a hearing that provided due process; the language at issue was footnote dicta, quite unnecessary to our holding.

B.

Resolving the central issue whether Baird's pre-termination hearing provided adequate due process does not end our inquiry. We must also address an issue that is dear to the heart of every lawyer seeking to bolster more elaborate arguments: waiver. The Board not unpersuasively argues that

Baird waived the right to contest the adequacy of his pre-termination hearing on due process grounds when he failed to attend the hearing. In response, Baird contends that he did attend the hearing to object to its procedures, and, moreover, claims that he was not legally required to attend to preserve his right to object when he had received advance notice that the hearing would be merely a kangaroo court.

We have frequently held that terminated employees who do not avail themselves of pre-termination hearings waive their right to contest the adequacy of such hearings. *See Fern v. Thorp Pub. Sch.*, 532 F.2d 1120, 1131-32 (7th Cir. 1976) (holding schoolteacher to be terminated for cause waived his claim of procedural due process violation when he knew the time, place and purpose of the pre-termination hearing before the school board but chose not to attend after conferring with his counsel) (internal citations omitted). Baird's conduct seems to lie somewhere between the green of attendance and the red of nonattendance. Baird did not participate in the discussion of the merits held at the hearing, but he and his attorney had requested the Board to implement procedures comporting with due process; when the Board refused Baird's requests, he attended the hearing, but remained only to object to the procedures. It would be difficult to see this as a default that automatically waives further objection as a matter of law.

Although the issue may be close, we conclude that Baird did not waive his right to contest the adequacy of the hearing on due process grounds. The obvious deficiency of the procedures offered in the instant case, and the fact that Baird did appear to state his objection to these procedures, distinguishes it from *Fern* and similar cases. Seventh Circuit authority establishes only that the right to object to an arguably deficient hearing is waived when an employer offers a pre-termination hearing and a public employee facing

termination fails to accept the offer by failing to appear. *Ryan v. Illinois Dep't of Children & Family Servs.*, 185 F.3d 751, 761 (7th Cir. 1999). *See also Flynn v. Sandahl*, 58 F.3d 283, 288 (7th Cir. 1995) ("employee cannot claim lack of due process when his employer offered him such a pre-termination hearing and he refused to attend."); *Cliff v. Bd. of Sch. Comm'rs of City of Indianapolis*, 42 F.3d 403, 414 (7th Cir. 1994) ("the right to such a hearing is waived when an employer offers a pre-termination hearing and the employee fails to accept."). Here, Baird did not fail to accept the hearing but appeared and sought to obtain a fairer one; he did attend for the purpose of objecting to the truncated procedures. The Board apparently had no intention of relaxing its procedural strictures. And the hearing would still have missed full due process by a country mile: even if Baird had learned of the informants' identities at his hearing, it would have been too late to confront and cross-examine them. He would still have been forced to construct a blind defense. Ignorant of the identities of his accusers, Baird would likely have been terminated whether or not he chose to participate in the hearing after objecting to its procedures, and it is hard to see how he could mount a rational defense without more information about the charges. Offering such a toothless procedure may have met minimum *Loudermill* requirements *if there had been full post-termination due process*, but it is hard to see Baird's limited participation as a waiver as a matter of law.

Precedent establishes that, when a pre-termination hearing is offered, "the offeree should assume that it will be a fair hearing until the offeror indicates otherwise." *Fern*, 532 F.2d at 1133 (citing *Suckle v. Madison Gen. Hosp.*, 499 F.2d 1364, 1367 (7th Cir. 1974). Baird contends that he was not obligated to participate in the hearing because the presumption of fairness evaporated after the Board notified him of the

hearing procedures and denied his request for additional procedures. This argument may overstate the appropriate position. *Fern* and *Suckle* are silent as to the propriety of conduct after a presumption of a fair hearing is apparently belied by the offeror's conduct. We believe the *presumption* of fairness continues and the plaintiff bears the risk of waiver, but under the present facts, when the plaintiff has requested reasonable safeguards and has been flatly denied both before and at the hearing and where nothing useful could apparently be gained by continuing participation, we will not find a waiver as a matter of law.

C.

Having found that the Board is not entitled to summary judgement on the issue of violation of Baird's due process rights and that Baird did not waive, as a matter of law, his right to contest the adequacy of the hearing on due process grounds, we turn finally to the question, which was not addressed by the district court, whether the Board members qualify for absolute or qualified immunity. Absolute immunity attaches to "all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1988). The Board contends that its individual members are absolutely immune from liability since various discrete actions in firing Baird--namely the determination of rules and procedures, participation in the pre-termination hearing and individual decisions to terminate Baird--were legislative acts. The issues raised by this appeal are, however, a totality involving the termination of an employee, which is an administrative act. The evidence does not establish that the Board members are entitled to legislative immunity.

Nor do Board members appear to be entitled to qualified immunity, which protects public officials who exercise discretionary or policymaking functions from liability in damages. *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 815-16 (7th Cir. 2001). The district court did not reach this issue. However, public officials are entitled to qualified immunity if their actions violate "clearly established statutory or constitutional rights then known to a reasonable officer." *Id.* at 816. Under the two-step analysis enunciated by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), we first assess whether "the state actor's conduct violated a constitutional right when viewed in the light most favorable to the party asserting the injury." If such a violation exists, we must determine whether the right violated was clearly established. *Id.*

We have already found that the Board violated Baird's due process rights by according him a hearing whose procedures were severely deficient. Thus, we proceed directly to the question whether Baird's rights were clearly established. We conclude that they are. A right must be established at the "appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). Our inquiry is defined by whether "it would be a clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 531 U.S. at 202. Qualified immunity thus affords public officials a certain leeway in their actions; "the concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular . . . conduct." *Id.* at 205. Reduced to its essential elements, if the public official's "mistake as to what the law requires is reasonable, the official is entitled to the immunity defense." *Id.*

Determining the reasonableness of a "mistake" does not necessitate comparison to a precedent that squares in every detail with the present case. *See Ulichny v. Merton Comm. Sch. Dist.*, 249 F.3d 686, 706 (7th Cir. 2001) ("It is not necessary for liability, however, that an identical factual situation had been legally decided adverse to the officer."). As earlier discussed, numerous cases from *Perry v. Sindermann* to *Loudermill* to *Lujan*--a case the defendants rely on to justify their conduct--have defined the contours of what process is due to a public employee who is to be terminated. Given the quality and volume of this precedent, we cannot determine on this record that the Board's conduct was a reasonable mistake, thereby establishing the defense of qualified immunity.

III.

It is always pleasant when the troublesome process of terminating an employee whose job performance is perceived as unsatisfactory can be concluded with a polite handshake and a heartfelt "fare-thee-well." Unfortunately, that ideal firing most often remains just that--an ideal. Here, not only did goodwill go by the boards but elementary fairness fell through the cracks. A lawsuit for breach of contract simply does not provide the due process which is missing elsewhere when a present entitlement is at stake.

For the above reasons we REVERSE and REMAND for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

Case No. 01 C 50228

[Filed: September 4, 2003]

Kelly Baird	)
	)
v.	)
	)
Board of Education for Warren Community Unit School District No. 205, et al.	)
	)

Philip G. Reinhard, Judge.

MEMORANDUM OPINION AND ORDER

Plaintiff, Kelly Baird, filed a two-count complaint in state court against defendants, Board of Education for Warren Community Unit School District No. 205 ("Board") and its individual members ("individual defendants"). The complaint alleges breach of contract in count I and a claim under 42 U.S.C. § 1983 for deprivation of procedural due process in count II. Defendants properly removed the action to this court based on federal question jurisdiction over the § 1983 claim. 28 U.S.C. §§ 1331, 1441(a). The court has supplemental

jurisdiction over the breach of contract claim pursuant to 28 U.S.C. § 1367. Plaintiff moves for partial summary judgment as to liability on the prong of his section 1983 claim which claims the procedures provided prior to his termination were inadequate. Defendants also move for summary judgment and to strike plaintiff's response to defendant's motion for summary judgment.

Plaintiff was hired by the Board under a 3-year contract to serve as superintendent/principal. The Board terminated plaintiff's employment under the "for cause" provision of the contract after only one year. The contract provided that discharge "for cause shall be for any conduct, act, or failure to act by the Superintendent which is detrimental to the best interests of the School District. Reasons for discharge for cause shall be given in writing to the Superintendent, who shall be entitled to notice and a hearing before the Board to discuss such causes." Plaintiff asserts the Board failed to provide him with a termination hearing that met constitutional procedural due process standards. On April 18, 2001, The Board sent plaintiff a letter notifying him of its intent to terminate him for cause, advising him of a May 16, 2001, hearing on the termination, that the causes for termination were set forth in his evaluation which was included with the letter and that he could be represented at the hearing. Plaintiff's counsel responded to this letter with a letter requesting information concerning charges in the evaluation and requesting a continuance of the termination hearing. The Board responded through its counsel by letter dated May 9, 2001, which indicated it was denying most of plaintiff's requests. The letter also stated that plaintiff could call witnesses but that the Board did not have subpoena power to compel witness attendance, that the Board would not call witnesses, that a single board member would present the case for termination, that other board members would speak to

certain issues and that questions by plaintiff would be limited to being directed to the board member presenting the case and to other board members only as to matters to which the board member had spoken. Plaintiff's counsel responded that the Board's failure to produce any witnesses rendered it impossible to cross-examine them and the failure to produce the names of individuals who provided the factual basis for the evaluation made it impossible for plaintiff to call them as witnesses. Plaintiff's counsel stated the inability to cross-examine his accusers made it impossible for plaintiff to defend himself against the accusations, that the procedures provided could not produce a fair hearing, and that plaintiff would not participate in the hearing beyond appearing to object to the procedures. The scenario described in the correspondence played itself out and plaintiff was terminated.

Defendants maintain the procedures followed met the constitutional standards for procedural due process for a pre-termination hearing because they provided plaintiff notice and an opportunity to be heard with a right to sue for breach of contract providing an adequate post-termination remedy. Plaintiff argues that because the pre-termination hearing was the only hearing, it had to provide the right to cross-examine his accusers in order to satisfy minimal procedural due process requirements and that the constitutional requirements are not met by the availability of a post-termination breach of contract action. To meet procedural due process requirements, a pre-termination hearing must provide notice of the charge, an explanation of the basis of the charge and an opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Plaintiff was given notice of the hearing and his evaluation which set out the perceived deficiencies in his performance. The hearing procedures allowed him to respond to these charges by presenting witnesses and his own

evidence. This procedure was sufficient for a pre-termination hearing. *See id.*

Plaintiff contends the pre-termination hearing was insufficient because it was the only hearing and did not allow him the opportunity to confront his accusers in a meaningful way. However, the hearing that was offered, coupled with the right to bring a state law breach of contract claim, provided plaintiff with due process. Plaintiff had a property interest in his employment contract. His contract was for a three-year term and could only be terminated early for cause. The pre-termination hearing offered him the chance to tell his side of the story prior to termination. The right to bring a breach of contract suit provides him with the opportunity to challenge the existence of cause through full judicial proceedings, including discovery to identify his accusers, the ability to confront and cross-examine them at trial, and the opportunity to be made whole through damages for breach. While plaintiff suggests his allegedly wrongful termination after the first year of the contract effectively deprived him of the ability to obtain employment as a superintendent elsewhere, he has not presented evidence the Board's action stigmatized him so that he suffered a tangible loss of employment opportunities so as to deny him a liberty interest without due process. *See Strasburger v. Board of Educ., Hardin County*, 143 F.3d 351, 356 (7th Cir. 1998), *cert. denied*, 525 U.S. 1069, 119 S. Ct. 800, 142 L. Ed. 2d 661 (1999). The contract created his property interest in employment and the interest of which he was deprived was limited to his rights under the contract for the remaining two years. In *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court set forth three factors to consider in determining whether due process was provided: (1) the private interest being affected by the government action, (2) the risk of an erroneous deprivation of that interest and the

probable value of additional or substitute safeguards, and (3) the government's interest. It is plaintiff's contract rights, the two remaining years of the contract term, which are the private interest affected by government action. The Board's interest is having an effective school superintendent/principal. Both of these are important interests. Looking at the remaining *Matthews* factor, the risk of erroneous deprivation, the pre-termination hearing provided plaintiff the chance to tell his story and a post-deprivation breach of contract suit allows plaintiff's contract rights to be vindicated, if wrongfully deprived, by allowing plaintiff to recover damages for breach. These procedures provided adequate safeguards against erroneous deprivation of plaintiff's property interest in the remainder of his contract.

Plaintiff also argues he was denied due process because the decisionmaker was not impartial. A person who has prejudged the matter cannot sit in judgment on a termination but partiality will not be presumed just because the Board both investigated and adjudicated the termination decision and it is presumed individuals making decisions affecting the public are acting in the public interest. *See Bakalis v. Golembeski*, 35 F.3d 318, 325-26 (7th Cir. 1994). Taking the evidence most favorably to plaintiff, it cannot be concluded that the individual defendants prejudged the case. The record reflects that various board members were contacted by district employees raising concerns about certain of plaintiff's actions and that some board members had concerns of their own from their personal experience. Some of these concerns were memorialized in memoranda written by some of the board members. However, these concerns were within the scope of matters board members would be expected to consider and their expressions of disapproval of plaintiff's handling of various matters is within the scope of their duties. The mere fact some of them may have been unhappy with plaintiff's

performance does not overcome the presumption they were acting impartially at the time of the discharge hearing.

For the foregoing reasons, plaintiff's motion for partial summary judgment as to liability on procedural due process grounds is denied. Defendant's motion for summary judgment is granted as to the procedural due process claims. Defendant's motion to strike is denied. Because this order disposes of all federal claims, the court declines to exercise supplemental jurisdiction over the state law breach of contract claim, which is remanded to state court. *See Payne v. Churchich*, 161 F.3d 1030, 1043 (7th Cir. 1998), *cert. denied*, 527 U.S. 1004, 119 S. Ct. 2339, 144 L. Ed. 2d 236 (1999). The balance of this case is dismissed with prejudice.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's motion for partial summary judgment as to liability on procedural due process grounds is denied. Defendant's motion for summary judgment is granted as to the procedural due process claims. Defendant's motion to strike is denied. The court declines to exercise supplemental jurisdiction over the state law breach of contract claim, which is remanded to state court. The balance of this case is dismissed with prejudice.

All orders in this case are now final and appealable.

Date: 9/4/2003

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 01 C 50228

[Filed: March 18, 2002]

BAIRD	)
	)
vs.	)
	)
BOARD OF EDUCATION	)
	)

OPINION BY: Philip G. Reinhard

MEMORANDUM OPINION AND ORDER

Plaintiff, Kelly Baird, filed a two-count complaint in state court against defendants, Board of Education for Warren Community Unit School District No. 205 ("Board") and its individual members ("individual defendants"). The complaint alleges breach of contract in count I and a claim under 42 U.S.C. § 1983 for deprivation of procedural due process in count II. Defendants properly removed the action to this court based on federal question jurisdiction over the § 1983 claim. 28 U.S.C. § 1441(a) The court has supplemental jurisdiction over the breach of contract claim pursuant to 28 U.S.C. § 1367. Defendants have moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Plaintiff was hired by the Board under a 3-year contract to serve as superintendent/principal. The Board terminated plaintiff's employment under the "for cause" provision of the contract after only one year. Plaintiff's complaint asserts the Board lacked cause to terminate him and failed to provide him with a termination hearing that met constitutional due process standards.

A 12(b)(6) motion is granted only if no set of facts consistent with plaintiff's complaint could be presented which would entitle him to judgment. *See Hedrich v. Bd of Regents of Univ. of Wisc. Sys.*, 274 F.3d 1174 (7th Cir. 2001) Defendants contend the facts pled in the complaint establish plaintiff could not prove a claim under either count of the complaint. They assert the alleged facts demonstrate cause for termination, that the availability to plaintiff of a breach of contract action obviates the need for any hearing, and that the hearing provided met due process requirements if a hearing was actually required. They also argue the individual defendants are protected from this suit by absolute and qualified immunity.[1]

Defendant contends *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001) requires dismissal of the § 1983 claim because plaintiff's ability to bring a breach of contract claim for his termination provides all the process that is due. In *Lujan*, the court held the availability of a breach of contract action under state law

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[1] While the complaint does not specify the individual defendants are being sued in their individual capacity, plaintiff asserts that they are (Pl. Memo. p. 14) and the allegations of the complaint and the request for punitive damages support reading the complaint as an individual capacity suit. *See Wynn v. Southward*, 251 F.3d 588, 592 (7th Cir. 2001)

provided constitutional due process to a party who was deprived of payment by the state under a contract where the state maintained the party failed to comply with the contract terms and the party claimed it had complied. *Id.*, at 196-97. *Lujan*, however, distinguished its facts from cases where plaintiff was presently entitled to pursue gainful employment. *Id.*, at 196. In doing so, *Lujan* does not appear to imply that a right to bring a post-termination suit for breach of contract can replace the previously recognized right to a hearing on the issue of cause, where a public employee with a contractual right to be discharged only "for cause" is terminated, see *Lalvani v. Cook County*, 269 F.3d 785, 794 (7th Cir. 2001), as the standard for procedural due process.

Inherent in the right to a hearing is the right to a hearing by an impartial tribunal. *See Bakalis v. Golembeski*, 35 F.3d 318, 323 (7th Cir. 1994). Plaintiff has alleged he properly performed the contract and that there was no cause for his termination. (Compl. ¶ 15) He has alleged that certain members of the Board were biased toward him and did not act as impartial decision makers concerning his employment. (*Id.*, ¶¶ 16,19) He has alleged the Board predetermined his termination (*Id.*, ¶ 27) and based its decision to terminate him solely on the animus and ill-will of the individual defendants. (*Id.*, ¶ 34 F). If he were to present facts proving these allegations, plaintiff would sustain a claim for breach of contract, and for due process violations against the defendants, from which the individual defendants would not be shielded by qualified immunity, *see Bakalis*, 35 F.3d at 326-27 nor do the allegations implicate only the types of actions by the individual defendants that would necessarily be protected by absolute immunity. *See Bogan v. Scott-Harris*, 523 U.S. 44, 56, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998). Plaintiff's complaint is sufficient to withstand a 12(b)(6) motion. Whether the hearing was adequate, the tribunal

impartial, the contract breached, or the individual defendants immune must await another day.

Defendants' motion to dismiss is hereby denied.

APPENDIX E

WARREN COMMUNITY UNIT DISTRICT #205
SUPERINTENDENT/PRINCIPAL EVALUATION
APRIL 18,2001
Dr. Kelly D. Baird

A rating is given for each category in which you were evaluated. The rating scale is from low to high, 1 being the lowest and 5 being the highest. Commentary to support the ratings is included below each category. Although some issues fall into more that one category, so as not to be repetitive, they may be noted in only one category.

1. Has sufficient enthusiasm. Rating: 4

Although the Board gave a rating of 4 in this area, further explanation is warranted. You have an enthusiastic tone when speaking which causes some of the Board members to give you a high rating in this area. However, the enthusiastic tone is misleading inasmuch as it is often inconsistent with your actions. You show little, if any signs of enthusiasm toward you job as Superintendent of the District and Principal of the elementary and middle schools. This rating reflects differing opinions of Board members as to whether it should reflect only vocalizes enthusiasm or follow-through as well.

For example, for the first time since the beginning of the school year, you, in November, pursued an opportunity to chaperone the 5th and 6th grade students on their Chicago field trip. The Board was pleased that you were showing signs of wanting to spend time with some of the students and, as their

Principal, get to know them better. Rather than ride the bus to Chicago with the students, spend time with them in Chicago and act as a chaperone, you drove separately, met the group for a very short time at the museum and left to spend the day with your companion.

2. Has satisfactory oral communicating ability. Rating: 3

The Board was split between 1 and 5 in this category resulting in an average of 3, again due to differing opinions as to what conduct the rating should reflect.

While you speak well in a one-on-one conversation, you often do not listen or listen to only part of what is being communicated.

An example would be when the Board President and Vice President told you that they were concerned with teacher morale. You took that concern and told another Board member that any question of morale was solely related to insurance issues.

3. Has satisfactory written communicating ability. Rating: 3

While some Board members felt your written communication was effective, others felt it was careless. On several occasions your written communications have had to be retracted because you failed to make sure your information was correct, for example changing meetings because you had failed to check for potential conflicts in the school calender.

4. Has satisfactory personal appearance. Rating: 4

You always appear well groomed.

5. Has proper degree of self-confidence. Rating: 3

There is a degree of self-confidence that is viewed as arrogance. Again this rating is reflective of the way the question is stated - some Board members rated this question a 5 because of your extreme self-confidence while others rated it a 1 considering that it is not a proper degree of self confidence you exhibit.

6. Uses sound judgment. Rating: 2

You have exercised poor judgment in most aspects of your job. The examples are too numerous to include here.

Key examples are: a) your failure to seek input in appropriate settings from teachers, other administrators and Board members in working on plans for the buildings and other issues leading to the referendum; b) encouraging teachers to spend in excess of their needs; c) encouraging teachers and planning for yourself to "play hooky" at school-related seminars; and d) buying office furniture without the Board's approval.

7. Has philosophy of education compatible with that of the community. Rating: 2

You have not taken enough interest in the community to even know what our educational philosophy might be. You simply allude to the State of Illinois 1997 Learning Standards.

Your philosophy of student discipline seems to be inapposite to that of the faculty. There are numerous examples that the teachers have related to various Board members describing your failure to seriously deal with discipline problems they have sent to you. The teachers have,

by and large, decided to handle discipline matters themselves. Your failure in this area is demoralizing to the students and staff and detrimental to the educational environment.

8. Has satisfactory relationship with staff. Rating: 1

The Board has been advised that you spend a minimal amount of time with the staff. The meetings that you do have are not substantive. There have been times you have had the teachers organize school improvement days by themselves. The teachers have decided to do things on their own because they cannot count on you for leadership or direction.

You have failed to establish clear lines of communication with staff regarding school goals, accomplishments, practices and policies as required by law. Further, your actions and inaction with respect to communication with staff have led to demoralization of staff and general breakdown in appropriate communication hierarchy and problem resolution procedures.

9. Has satisfactory relationship with the board. Rating: 2

You have shown no respect for the Board of Education. You have told people that you intend to irritate the board and you wish to "break the district". This is an unacceptable attitude that undermines the Board's goals and efforts and impedes the general progress of the District.

10. Uses ability to delegate sufficiently. Rating: 1

In order to delegate, one must take an interest in and responsibility over matters. You do not. You simply relinquish your responsibility and tell the teachers that they are in charge.

11. Has satisfactory concern for detail. Rating: 1

You show little concern for detail and rarely show concern for the big picture. When you do take an interest in details, it is often inefficient. For example, suggesting that attorneys, architects and engineers be present at Board meetings when their input could easily be handled more efficiently by telephone or fax. Also, you often fail to give a principal's report even when one is warranted - for example, in October, you should have reported the testing of the students that was taking place, the school pictures that were being taken and the Halloween events that were being scheduled.

12. Has satisfactory decision making ability. Rating: 2

You make decisions without first seeking the appropriate information.

13. Leadership ability is satisfactory. Rating: 1

Your lack of presence in the District makes it impossible for you to exercise appropriate leadership skills. You have not been in the District for a full seven-day week. You routinely arrive late on Monday and leave early on Fridays. You whereabouts are often unknown to the staff making it impossible to contact you in the case of an emergency.

You have never been present for school improvement days or for the parent-teacher conferences in November. You have told individual teachers to be in charge of school improvement days and do what they want. Some of the teachers feel that the aides are allowed to do whatever they want to do.

This conduct constitutes an abdication of your responsibilities under your employment contract and Illinois law. The Board finds that your lack of presence and direction to staff results in a failure in leadership and an inability to maintain a positive education and learning climate.

14. Has satisfactory ability to shoulder responsibility. Rating: 1

You have taken little, if any, responsibility for school related matters since your arrival.

15. Follows policy satisfactorily. Rating: 2

You have not been sufficiently present to follow much policy. When you have had occasion to intervene in disciplinary policy, you seem to encourage the misbehaviors and minimize the offense.

16. Has satisfactory community image. Rating: 1

You neither live in the community (we do not consider staying at a bed & breakfast establishing a residence) nor do you spend any recreational or social time in the community. You have failed to become involved in any community activities. Your image of the community and the community's image of you is one of shared disdain. A superintendent/Principal's relationship with the community should guide his policy and curriculum goals and generally be reflected in a vision for the District. You have failed to accomplish this fundamental aspect of your duties.

17. Is dependable. Rating: 1

It is impossible to depend upon you. Your whereabouts are often unknown. We can never be sure that the information that you disseminate is accurate. You tell us that you have spoken to people or been to meetings and we later discover that the people you were to meet with say you did not attend the meeting or the person that you called had not spoken to you.

18. Is too sensitive - takes things too personally. Rating: 1

The Board believes that your reaction to our involvement in school matters if inappropriately defensive. Examples include: a) the October meeting wherein Annelisa questioned the frequency and content of staff meetings at Apple River Middle School - you immediately became defensive and asked her if she had information to prove that you did not have staff meetings and tried to intimidate Annelisa from questioning him further; b) the March meeting wherein you reported that a preschool mother had called and indicated that she had spoken to Board members regarding the rehiring of the preschool teacher despite prior complaints about her teaching. You reacted by saying that you questioned why we even bothered having an administration staff.

19. Has right amount of persistence. Rating: 2

You rarely follow up on requests for further information.

20. Is adaptable when required. Rating: 2

You give the impression that your way is the only way in most instances. You appear to have no desire to adapt to the District's interests or goals.

21. Has sufficient aggressiveness. Rating: 3

As with item 5, some members of the Board believe that your degree of aggressiveness should reflect a high rating in this category while other members believe that your aggressiveness is excessive. The difference in interpreting the application of the rating resulted in scores of 5 and 1 averaging three.

22. Has pronounced interest in improving the instructional program. Rating: 3

You are required by your employment contract and Illinois law to have as a primary goal the improvement of instruction in the District. The only interest you have shown is the concept of aligning the District's curriculum to the 1997 State of Illinois Learning Standards - and improvement that was already underway prior to your arrival.

23. Generally open-minded. Rating: 2

We do not believe that you are satisfied or happy unless things are done your way.

24. Has ability to organize well. Rating: 3

You are adequate at organizing your materials. It is noted, however, that destroying all of you predecessor's files was not a productive educational effort.

25. Plans ahead sufficiently. Rating: 2

As noted earlier, you often fail to review the school calendar to avoid conflicts prior to scheduling meetings.

26. Satisfactory ability to conflict. Rating: 1

You either blame others or become defensive when faced with conflict.

27. Satisfactory ability to live with pressure. Rating: 3

The Board does not believe that you have " lived" with pressure in your capacity as Superintendent/Principal. You are not available when pressure situations arise, or you simply tell the staff to deal with matters as they wish.

28. Has satisfactory amount of courage. Rating: 3

The Board has not seen you in any situation that required you to exercise courage.

29. Is very honest. Rating: 1

The Board believes that you have not been honest from the start. At the time we interviewed you, you seemed to share our interest in your spending time in our communities, having your family happily residing in our community, and developing a good relationship with our students. Your family never intended to move here - nor have you established a home here. You have made no attempt to be a part of our community.

There have been many instances where you have indicated that you went somewhere, spoke to someone, or met with someone and we have later discovered that you did not go where you said you were going, speak to whom you said you were speaking or meet with the whom you said you were meeting.

30. Has sufficient interest in public relations. Rating: 2

Based upon your lack of presence in and interaction with our communities, you seem to be completely disinterested in the public relations of this District.

31. Has satisfactory participation in local, state and national programs. Rating: 2

You have participated in nothing local. Other programs and seminars you have been scheduled to attend you have either wholly or partially failed to attend.

32. Has good interest and concern for employee morale. Rating: 1

You have made little, if any, effort to even get to know the employees, and this, clearly show no interest or concern for employee morale. We have reports that employees have shared concerns with you and that you have not followed up on their concerns even though you indicated that you would.

33. Is sensitive to the problems of others. Rating: 2

You are not in the District enough to obtain the opportunity to express sensitivity to the problems of others in the District.

34. Has satisfactory willingness to compromise. Rating: 2

You have neither made compromises nor shown a willingness to do so.

35. Is well informed. Rating: 2

It is difficult to be well informed about our District when you spend so little time in it.

36. Has satisfactory ability to evaluate. Rating: 3

Since the time the Board individually completed this rating, two incidents have come to light that would likely lower this rating:

First, the accelerated reader program staff requested additional help when first graders became involved in the program. You appropriately told the Board of her concern and indicated that you would monitor the program to see if additional help was warranted for the first graders. You reported to the Board that you had monitored the program and the additional assistance was unwarranted. Later, Annelisa Cleary served as a substitute in the program for two days. While Annelisa met with the aide responsible for the program to prepare for her two days of substitution, the aide indicated that you had never observed the program. When questioned about this, you indicated that you had been in education long enough to monitor a program simply by walking by the classroom door. However, Mrs. Cleary believes that the aid's concern with the first graders was, in fact, warranted.

Second, you recommended that the board re-hire a non-tenured staff member without ever being her classrom for the purpose of evaluating her performance. In fact, you did not know that she was non-tenured until a Board member pointed it out.

37. Uses tact. Rating: 2

You addressed a group of concerned citizens who were invited to become part of the referendum steering committee. As part of your conversation, you indicated that you were soliciting other "younger" people to become part of the steering committee intimating that the people present were "old". At the time, you had no idea about whom or to whom you were speaking.

38. What suggestions do you have for me to improve as Superintendent of the District?

You have generally demonstrated unsatisfactory performance of your duties as Superintendent/Principal. You have failed to relate to the students with appropriate authority, failed to respond, communicate or lead the staff, and failed to demonstrate appropriate respect and communication with the Board and the communities. You have not provided necessary focus or guidance to the District, and you lack of presence and accessibility has resulted in a general lack of confidence in your leadership.

Based on your performance to date, the Board does not believe that you have the ability to make necessary improvements in order to become an adequate Superintendent/Principal in the District.

38. What suggestions do you have for me to improve as Superintendent of the District?

Move to the district full time (as is required in your contract) and focus on becoming part of the community. Become involved in community activities and get to know people outside the school district. This was discussed during

your interviews and you promised that you would join some organizations and attend activities.

Spend adequate time on elementary principal duties and get to know you staff. Teacher morale is extremely low and it may be difficult to rebuild. Some teachers feel that you don't even know who they are because they rarely see you or never talk to you.

Get to know your students and involve yourself with them. Take interest in their activities and attend games, concerts, plays and contests. Staying in the community on the weekends would help a great deal. Students should know who you are and many of them don't unless they've been sent to your office. You should be visible to them; we know many of the junior/senior high school students don't even recognize you.

Utilize the resources you have in the district. When plans were drawn for the building, Mr. Nielsen and the board could have given much input for the architects, but weren't asked until plans were already made. You need to have a good working relationship with your principal which means he need to be included in discussions that affect him, his building and his students. In a small district you need to interact a lot with your staff. With the board some problems could have been alleviated if you had discussed some issues with us before acting on them (e.g., the furniture). We won't always agree on things, but they should be worked out without getting defensive or hearing negative comments at a later date.

While organizing the referendum required extra time, we feel that the district has suffered in other respects. There needs to be a strong leadership image and a high level of trust between personnel and the superintendent as well as between

the board and the superintendent. We don't feel that this has been a "good fit" between you and our district.

APPENDIX F

SUPERINTENDENT/PRINCIPAL'S EMPLOYMENT CONTRACT

Agreement between the Board of Education of Warren Community Unit School District No. 205, Jo Daviess County, Illinois, hereinafter referred to as the "Board," and, Kelly D. Baird, hereinafter referred to as the "Superintendent/Principal."

A. EMPLOYMENT AND COMPENSATION

1. The Board hereby employs the Superintendent/Principal for three (3) years, commencing on July 24, 2000, and terminating on June 30, 2003. The Superintendent/Principal's salary for the Contract year July 24, 2000 through June 30, 2001, shall be based on an annual salary of Seventy-One Thousand Dollars ($71,000.00), but shall be prorated to the amount of Sixty Six Thousand Nine Hundred Dollars ($66,900.00). This prorated salary is based on a 245 day work year during the first year of the Contract, rather than the 260 day work year which will be applicable in subsequent contract years. Such salary shall be payable in equal installments in accordance with the rules of the Board governing payments of other administrative staff members in the District. The Superintendent/Principal hereby accepts employment upon the terms and conditions hereinafter set forth.

2. The annual salary state in paragraph A.1 of this contract, may be adjusted in subsequent years of employment

under this contract by mutual agreement of the parties, but in no event will such future annual salary be less than that in the first year of this contract. Any such adjustment in salary shall be stated in an amendment to this contract, signed by the parties, and attached hereto and incorporated herein.

3. In addition to the annual salary stated in paragraph A.1 of this contract, the Board shall pay on behalf of the Superintendent/Principal to the State of Illinois Teachers' Retirement System and the Teachers' Health Insurance Security Fund the Superintendent/Principal's required contributions to said pension system and health fund. The Superintendent/Principal shall not have any right or claim to said amounts, except as they may become available at the time of retirement or resignation from the State of Illinois Teachers' Retirement System and the Teachers' Health Insurance Security Fund. Both parties acknowledge that the Superintendent/Principal did not have the option of choosing to receive the contributed amounts directly, instead of having such contributions paid by the Board to the Teachers' Retirement System and Teachers' Health Insurance Security Fund, and further acknowledge that such contributions are made as a condition of employment to secure the Superintendent/Principal's future services, knowledge and experience.

4. Any salary or other adjustment or modification made during the life of this contract shall be in the form of a written amendment and shall become a part of this contract, but such adjustment or modification shall not be construed as a new contract with the Superintendent/Principal, nor as an extension of the termination date of this contract.

5. During the term of this contract, the Superintendent/Principal shall hold a valid and properly

registered certificated issued by the State of Illinois Teachers' Certification Board qualifying him to act as Superintendent of the School District and as Principal in the School District.

6. The Superintendent/Principal represents that he is not under contract with any other school district for any portion of the term covered by this Contract.

7. As a required condition of employment for new employees, and prior to commencing duties under this Contract, the Superintendent/Principal shall submit to a physical examination by a physician licensed in Illinois to practice medicine and surgery in all its branches, and shall provide the Board with the physician's report of such examination pursuant to paragraph 24-5 of the *School Code*. The Superintendent/Principal shall further submit, at Board expense, to a physical or mental examination by a physician licensed in Illinois to practice medicine and surgery in all its branches whenever the Board deems such examination necessary and in accordance with applicable law. As a condition of employment, the Superintendent/Principal also agrees to comply with all health requirements established by law.

8. The Superintendent/Principal acknowledges that, pursuant to the *School Code*, he waives any right to tenure in the School District for the duration of this multi-year contract and any multi-year extension thereof.

9. As a required condition of employment for new employees, the Superintendent/Principal shall authorize a criminal background investigation by the Board, pursuant to the *School Code*, and DCFS Child Abuse Registry background investigation.

10. The Superintendent/Principal shall establish his residency within the School District by January 24, 2001, and shall remain a resident during the term of this contract as a condition of his employment as Superintendent/Principal.

B. BENEFITS

1. The Board shall reimburse the Superintendent/Principal for reasonable monthly expenses incurred in the performance of his duties as approved by the Board. Itemization shall be made by the Superintendent/Principal of all expenses incurred in accordance with the *Internal Revenue Code* as amended.

2. The Board will provide the Superintendent/Principal with the following benefits:

a. Full-family hospitalization/medical insurance, as provided under any program effective in the District;

b. Reimbursement for reasonable District related travel expenses (mileage), not including travel to and from the District and home, not to exceed $600 annually. Substantiation of all expenses incurred pursuant to this provision shall be made by the Superintendent/Principal in accordance with the regulations of the *Internal Revenue Code* as amended.

c. Membership dues for one professional organization subject to prior Board approval.

3. The Superintendent/Principal shall be entitled to a paid vacation of twenty (20) working days in each contract year, provided, however, that any vacation time in excess of five

(5) school days shall be mutually agreed upon by the Board and the Superintendent/Principal. Vacation must be taken within the twelve-month period, provided, however vacation days may be carried over with approval of the Board. The Superintendent/Principal shall also be entitled to all legal state or District - designated holidays. Such holidays shall include the Friday after Thanksgiving, three (3) days during Winter Break and two (2) days during Spring Break. The remaining days of Winder and Spring recess periods, and all of Summer recess periods shall constitute working days unless specifically scheduled and credited toward vacation days listed above.

4. The Superintendent/Principal shall be granted sick leave, as defined in Section 24-6 of the *School Code*, of twelve (12) working days per year, which may be accumulated to a maximum of 180 days.

5. The Superintendent/Principal is expected to attend appropriate professional meetings at the local and state levels and, subject to prior written Board approval, at the national level. All reasonable expenses incurred shall be reimbursed by the Board.

C. POWERS AND DUTIES

1. In his capacity as Superintendent, the Superintendent/Principal shall have charge of the administration of the schools under the direction of the Board; he shall be the chief executive officer for the Board; he shall recommend the selection, retention and dismissal of, and direct and assign, teachers and other employees of the School District under his supervision; he shall organize and direct the administrative and supervisory staff; he shall make recommendations to the Board concerning the budget, building plans, location of sites, and the selection of

textbooks, instructional material, and courses of study; he shall direct the keeping of all records and accounts, and aid in the making of all reports, as required by the Board; he shall recommend rules, regulations, and procedures deemed necessary for the welfare fo the School District; and, in general, he shall perform all other duties incident to the office of the Superintendent/Principal as the Board may delegate to him or as required by law.

2. In his capacity as Superintendent, the Superintendent/Principal shall devote his entire time, attention, and energy to the business of the School District and related professional activities. With the permission of the Board, the Superintendent/Principal may attend university courses, seminars, or other professional growth activities; serve as a consultant to another district or educational agency for a short-term duration without loss of salary; lecture and engage in writing activities and speaking engagements. The Superintendent/Principal may not jeopardize the functioning of the School District by any lengthy and conspicuous absence for such professional activities.

3. In his capacity as Principal, the Superintendent/Principal shall supervise the operation of attendance centers as the Board shall determine necessary and shall have as his primary responsibility the improvement of instruction. The Superintendent/Principal also shall assume administrative responsibilities and instructional leadership, under the supervision and direction of the Board and in accordance with the laws of the State of Illinois and the policies, rules and regulations of the Board, for the planning, operation and evaluation of the educational program of his assigned attendance area.

4. In his capacity as Principal, the Superintendent/Principal shall submit recommendations, as requested, to the Board concerning the appointment, retention, promotion and assignment of all personnel assigned to his attendance centers and shall keep such other registers, records and reports as may be directed by the Board or required by law.

5. In his capacity as Principal, the Superintendent/Principal shall, in accordance with the requirements fo Section 10-22.6 of the *School Code* and Board policy, suspend from school and from the school bus any students at his assigned attendance area who are found to be guilty of gross disobedience or misconduct.

D. REAPPOINTMENT

1. Notice of intent not to renew this contract shall be given to the Superintendent/Principal by the Board by March 1 of the year in which the contract expires. Said notice shall be in writing and state the specific reason for non-renewal. Failure to provide timely notice of non-renewal shall automatically renew this contract for one (1) additional year. The Superintendent/Principal shall notify the President and Secretary of the Board by February 1 of the year in which the contract expires that failure of the Board to give the Superintendent/Principal said notice of intent not to renew shall extend this contract for one (1) additional year. The failure of the Superintendent/Principal to give the required reminder notice to the Board shall waive the obligation of the Board hereunder to give its notice of intent by March 1. Within ten (10) days after receipt of a notice of intent not to renew this contract, the Superintendent/Principal may request a closed session hearing on the dismissal.

2. At the end of any year of this contract, the Board and Superintendent/Principal may mutually agree to extend the employment of the Superintendent/Principal for a multi-year period only if the Board finds that the Superintendent/Principal has met or exceeded the goal and indicators of student performance and academic improvement set forth in Section D.3 of this Contract.

3. The goals and indicators of student performance and academic improvement used by the Board to measure the performance and effectiveness of the Superintendent/Principal shall be determined by the following procedure:

a. Annually, the Superintendent, with the assistance of his administrative team, shall (1) evaluate student performance, using criteria including, but not limited to, student performance on standardized tests such as performance based on the Illinois Goals and Assessment Program Test or the Iowa Test of Basic Skills, successful completion of the curriculum, attendance, and drop-out rates; (2) review the curriculum and instructional services; and (3) report to the school board on his finding as to (a) student performance and (b) recommendations, if any, for curriculum or instructional changes as a result of his evaluation of student performance.

b. The presentation of the report shall constitute the achievement of the goals and indicators of student performance and academic improvement as required by Section D.2 of this Contract and Section 10-23.8 of the *School Code*.

The above goals and objectives shall remain in force during the term of this contract and any extension thereof for the Board's use in measuring the performance and effectiveness of the Superintendent/Principal, unless modified in writing by amendment to this contract by mutual agreement of the parties.

If, at the end of any year of this contract, the Board and Superintendent/Principal mutually agree to extend the employment of the Superintendent/Principal, and the Board has determined that the Superintendent/Principal has met or exceeded the goals and indicators of student performance and academic improvements described in Section D.3 of this contract, the Board shall take specific action to discontinue this contract and enter into a new contract.

E. TERMINATION

1. This employment contract may be terminated by:

   a. Mutual agreement;

   b. Permanent disability (inability to perform essential job functions with or without accommodation);

   c. Discharge for cause; or

   d. Death.

2. Regular attendance and attention to the duties of the position being an essential function of the Superintendent/Principal's job, the Board may terminate this contract for reasons of permanent disability or incapacity at any time after the Superintendent/Principal has exhausted his accumulated sick leave and either has been absent from his

employment for a continuous period of three (3) months or presents to the Board a physician's statement certifying that he is permanently disabled or incapacitated. All obligations of the Board shall cease upon written notice of termination for permanent disability or incapacity, provided that the Superintendent/Principal shall be entitled to a hearing before the Board if he so requests. The Board reserves the right to require the Superintendent/Principal to submit to a medical examination, either physical or mental, to determine that the Superintendent/Principal is able to perform all job-related functions whenever the Board reasonably believes it necessary. Such examination shall be performed by a physician licensed to practice medicine in all its branches, who is selected and paid by the Board.

3. Discharge for cause shall be for any conduct, act, or failure to act by the Superintendent which is detrimental to the best interests of the School District. Reasons for discharge for cause shall be given in writing to the Superintendent, who shall be entitled to notice and a hearing before the Board to discuss such causes. If superintendent/Principal chooses to be accompanied by counsel at such hearing all such personal expenses shall be paid by the Superintendent/Principal. The Board hearing shall be conducted in executive session.

F. EVALUATION

The Board and Superintendent/Principal agree that annually they shall mutually discuss and evaluate their working relationship, rapport, and understanding. By May 1 of each year of the contract, the Superintendent/Principal's performance shall be appraised by the Board and a written evaluation of that performance given to the Superintendent/Principal., except in the final year of this contract for which such appraisal and written evaluation shall

be completed by March 1. After such evaluation, the parties may schedule a meeting to review the evaluation and determine, if necessary, the terms and conditions of the continued future employment of the Superintendent/Principal.

G. NOTICE

Any notice or communication permitted or required under this Agreement shall be in writing and shall become effective on the day of mailing thereof by first class mail, registered, or certified mail, postage prepaid, addressed:

If to the Board, to: President
Board of Education
Warren Community Unit School
District No. 205
109 Mary Street
Warren, Illinois 61087

If to the Superintendent/Principal, to: _____
_____
_____

or at the last address of the Administrator contained in official Business Office records.

H. TECHNICAL CLAUSES

1. This contract has been executed in Illinois and shall be governed in accordance with the laws of the State of Illinois in every respect.

2. Paragraph headings and numbers have been inserted for convenience of reference only, and if there shall

be any conflict between such headings or numbers and the text of this Contract, the text shall control.

3. This contract contains all terms agreed upon by the parties with respect to the subject matter of this contract and supercedes all prior agreements, arrangements, contracts and communications between the parties concerning such subject matter, whether oral or written.

4. Except as may otherwise be provided, no subsequent alteration, amendment, change or addition to this Agreement shall be binding upon the parties unless reduced to writing and duly authorized and signed by each of them.

5. This Contract may be executed in one or more counterparts, each of which shall be considered an original, and all of which taken together shall be considered one and the same instrument.

6. The Board retains the right to repeal, change or modify any policies or regulations which it has adopted or may hereafter adopt, subject however, to restrictions contained in the *School Code* and other applicable law.

7. If any provision, paragraph, phrase, clause or word contained herein is held to be void, invalid or contrary to law by a court of competent jurisdiction, it shall be deemed removed herefrom, and the remainder of this Agreement shall continue to have its intended full force and effect.

SIGNATURE PAGE FOLLOWS.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates stated below.

Superintendent/Principal

/s/_____
Kelly Baird

8/16/00
Date

BOARD OF EDUCATION OF
WARREN COMMUNITY UNIT
SCHOOL DISTRICT NO. 205,
JO DAVIESS COUNTY, ILLINOIS

By: /s/_____
Monica L. Stephan, President

8-16-00
Date

ATTEST:

/s/_____
Judy K. Gates, Secretary

8-16-00
Date